

**MF 02-12**

**Tax Type: Motor Fuel Use Tax**

**Issue: Dyed/Undyed Diesel Fuel (Off Road Usage)**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

---

---

**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE  
D/B/A ABC, INC.,  
Taxpayer**

No. 02-ST-0000  
SSN 000-00-0000  
Motor Fuel Tax Refund Claim  
Period 6/01 to 9/01

**Ted Sherrod**

**Administrative Law  
Judge**

---

---

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Special Assistant Attorney General Gary Stutland on behalf of the Illinois Department of Revenue; John Doe, *pro se*.

**Synopsis:**

This matter has arisen as the result of a protest by John Doe (hereinafter referred to as "taxpayer") of the denial of the taxpayer's claim for refund for motor fuel tax paid on fuel used in his 1984 Bertram 1170 HP charter boat during the period June, 2001 to September, 2001. The taxpayer timely protested the Department of Revenue's ("Department") denial of his claim. A hearing on the taxpayer's protest was held on September 19, 2002. Following a review of the testimony and documents of record, it is recommended that this matter be decided in favor of the Department.

**Findings of Fact:**

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the Department's denial of the taxpayer's claim for refund of Illinois Motor Fuel Tax for the period covering June, 2001 to September, 2001. Department Group Ex. 1.
2. Taxpayer is the owner and operator of ABC, Inc., which operates a 1984 Bertram 1170 HP charter boat owned by the taxpayer and docked in Anywhere Harbor, a part of the Anywhere Park District, in Anywhere, Illinois. Tr. pp. 3, 6, 7; Department Group Ex. 1.
3. Taxpayer is licensed by the City of Anywhere as a commercial boat operator. Department Group Ex. 1.
4. Taxpayer purchased, and paid tax on, undyed diesel fuel for use in his charter boat because the Anywhere Park District, and its contractor, Parker, operator of Anywhere Harbor where the taxpayer's boat was docked, does not sell dyed diesel fuel due to environmental regulations. Tr. pp. 6, 7, 11.
5. The taxpayer did not purchase dyed diesel fuel because of the cost in fuel consumed in transporting his boat to the nearest tanker truck where dyed diesel fuel was available. Tr. pp. 6, 7, 11.
6. Taxpayer filed a claim for refund for the tax it paid when purchasing undyed diesel fuel for purposes other than operating a motor vehicle upon public highways or operating a recreational-type watercraft upon the State's waterways. Tr. p. 6; Department Group Ex. 1.

### **Conclusions of Law:**

Section 2 of the Illinois Motor Fuel Tax Act (“IMFTA”) imposes a tax on “... the privilege of operating motor vehicles upon the public highways and recreational-type watercraft upon the waters of this State.” 35 ILCS 505/2. Tax is measured by the number of gallons used (35 ILCS 505/2), and is to be collected by licensed receivers, distributors or suppliers, or paid directly by others. 35 ILCS 505/5, 35 ILCS 505/5a, 35 ILCS 505/6, 35 ILCS 505/6a, 35 ILCS 505/7, 35 ILCS 505/7b. Certain types of special fuels purchased for off-highway use are exempt from tax. 35 ILCS 505/13. Specifically, section 4d of the IMFTA provides that “(A)ll special fuels sold or used for non-highway purposes must contain only the dye Solvent Red 164 ... .” 35 ILCS 505/4d. Section 13 of the IMFTA, 35 ILCS 505/13, (hereinafter “section 13”) provides that “(N)o claim based upon the use of undyed diesel fuel shall be allowed except for undyed diesel fuel used by a commercial vehicle, as that term is defined in Section 1-111.8 of the Illinois Vehicle Code ... .” 35 ILCS 505/13. Section 13 is the only provision of the IMFTA that authorizes a refund claim for the use of undyed fuel. Accordingly, the issue in this case is whether the taxpayer is entitled to a refund for the use of undyed diesel fuel in a commercial charter boat under section 13.

Section 21 of the IMFTA, 35 ILCS 505/21, incorporates various sections of the Retailers’ Occupation Tax Act (“ROTA”), 35 ILCS 120/1 *et seq.* Among those sections is ROTA § 6b, which provides in part:

As soon as practicable after a claim for credit or refund is filed, the Department shall examine the same and determine the amount of credit or refund to which the claimant or the taxpayer’s legal representative ... is entitled and shall, by its Notice of Tentative Determination of

Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein.

35 ILCS 120/6b

In this case, the Department has introduced into the record its denial of the taxpayer's claim for refund under the certificate of the Director. Department Group Ex. 1. Pursuant to § 21 of the IMFTA, that determination is prima facie correct. 35 ILCS 505/21.

The Department's case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157 (1968); Du Page Liquor Store v. McKibbin, 383 Ill. 276, 279 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's determination. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833 (1<sup>st</sup> Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the determination is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333 (1958); A.R. Barnes & Co., *supra*. Oral testimony without corroborating books and records is insufficient to overcome the Department's prima facie case. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203 (1<sup>st</sup> Dist. 1991).

Moreover, in this case the taxpayer is seeking an exemption from the motor fuel tax. It is well settled in Illinois that a statute exempting property or an entity from taxation must be strictly construed against exemption, with all facts construed and

debatable questions resolved in favor of taxation. People ex rel. Nordlund v. Home for the Aged, 40 Ill. 2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App. 3d 430 (1<sup>st</sup> Dist. 1987). Based on these rules of construction, the Illinois courts have placed the burden of proof on the party seeking exemption and have required such party to prove by clear and convincing evidence that it falls within the appropriate statutory exemption. Metropolitan Sanitary District of Greater Chicago v. Roswell, 133 Ill. App. 3d 153, 155 (1<sup>st</sup> Dist. 1985) (“ ... the burden is on the party seeking the exemption to clearly and convincingly prove that it is within the contemplation of the statute”). For the reasons enumerated below, I conclude that the taxpayer has not borne its burden of proof in this case, and has failed to present clear and convincing evidence that it is entitled to an exemption from the IMFTA.

The taxpayer's primary argument at hearing was that the Department had previously accepted its refund claims in the same manner as the one filed for the claim period at issue here. Tr. pp. 6, 7, 16. The taxpayer also argued that it was not economically feasible for him to purchase dyed fuel for his business. No dealer close to the taxpayer's charter boat dock sold dyed fuel (Tr. pp. 6, 7), and the cost of traveling to the nearest location where dyed diesel fuel was available would be greater than any tax savings. Tr. p. 11. Because of these compliance costs, the taxpayer argues that the Department should continue to grant its refund claim as it has in the past.

While the taxpayer has previously received refunds for the cost of undyed fuel used in his boat, such claims are expressly barred after January 1, 2001 by 86 Ill. Admin. Code, ch. I, sec. 500.235(k).<sup>1</sup> This regulation is consistent with Public Act 91-173,

---

<sup>1</sup> 86 Ill. Admin. Code, ch. I, sec. 500.235(k) limits refunds for the use of undyed diesel fuel that is not used in manufacturing or agriculture, in refrigeration units or by local governments to undyed fuel used in a

effective January 1, 2000 (see P.A. 91-173, § 99), which significantly changed the IMFTA after that date. Perhaps the most significant change involved the legislature's amendment to section 13 of the IMFTA, 35 **ILCS** 505/13. This section now provides that "(N)o claim based upon the use of undyed diesel fuel shall be allowed except for undyed diesel fuel used by a commercial vehicle, as that term is defined in section 1-111.8 of the Illinois Vehicle Code ... ." 35 **ILCS** 505/13. Section 1-111.8 of the Illinois Vehicle Code, 625 **ILCS** 5/1-100 *et seq.*, defines a commercial vehicle as "(A)ny vehicle operated for the transportation of persons or property in the furtherance of any commercial or industrial enterprise, For-Hire or Not-For-Hire, but not including a commuter van, a vehicle used in a ride sharing arrangement when being used for that purpose, or a recreational vehicle not being used commercially." 625 **ILCS** 5/1-111.8. Section 5/1-217 of the Illinois Vehicle Code, 625 **ILCS** 5/1-217, defines the term "vehicle" as follows:

Vehicle. Every device, in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power, devices used exclusively upon stationary rails or tracks and snowmobiles as defined in the Snowmobile Registration and Safety Act.  
625 **ILCS** 5/1-217

The record shows that the taxpayer seeks a refund for undyed diesel fuel used in a watercraft, its 1984 Bertram 1170 HP charter boat. As noted above, the only provision of the IMFTA authorizing a refund for the use of undyed diesel fuel limits this refund to fuel used in certain types of "vehicles". The term "vehicle", as used in section 13, is clearly

---

"Commercial Motor Vehicle" as defined in 86 Ill. Admin. Code, ch. I, sec. 500.100. 86 Ill. Admin. Code, ch. I, sec. 500.100 defines the term "Commercial Motor Vehicle" to mean "a motor vehicle used, designed, or maintained for the transportation of persons or property and either having 2 axles and a gross vehicle weight or registered gross vehicle weight exceeding 26,000 pounds or 11,793 kilograms, or having 3 or

limited to transportation devices that can be operated on the highway. This term does not encompass transportation devices that are designed for use on waterways rather than highways. As a consequence, a charter boat does not constitute a “ vehicle” falling within the scope of section 13 since it is designed for use exclusively on waterways, and is not designed for highway use. Nor does it constitute a “Commercial Motor Vehicle” under 86 Ill. Admin. Code, ch. I, sec. 500.100.

Neither section 13 nor 86 Ill. Admin. Code, ch. I, sec. 500.235(k) provides any relief from tax on motor fuel for undyed fuel that is not used in a vehicle of any kind. A charter boat does not constitute a vehicle, or a commercial vehicle as used in section 13 or under 86 Ill. Admin. Code, ch. I, sec. 500.235(k). Since only commercial vehicles, a category that does not include boats, are allowed a refund for the use of undyed diesel fuel after January 1, 2001, the taxpayer’s use of undyed diesel fuel in his charter boat does not qualify for exemption under the IMFTA. Since the taxpayer cannot possibly show that his charter boat constitutes a vehicle, or commercial vehicle as this term is used in section 13 or in 86 Ill. Admin. Code, ch. I, sec. 500.235(k), the taxpayer cannot meet the burden of proof required to establish that he is entitled to the refund of motor fuel tax he seeks.

During the hearing, Mr. Doe also contended that he used dyed diesel fuel in his charter boat during the refund claim period in controversy. Tr. pp. 10, 11, 12, 13. However, he introduced no receipts, invoices or other documentary evidence to support this claim. Moreover, this claim contradicts the taxpayer’s assertion that the use of dyed diesel fuel was not economically feasible and is, therefore, not credible. Since the

---

more axles regardless of weight, or that is used in combination, when the weight of the combination exceeds 26,000 pounds or 11,793 kilograms gross vehicle weight.”

taxpayer's testimony that he used dyed diesel fuel during the claim period was not corroborated in any way, this testimony is insufficient to rebut the Department's prima facie case. Mel-Park Drugs, *supra*.

**WHEREFORE**, for the reasons stated above, it is my recommendation that the Department's denial of the taxpayer's claim for refund for the period June, 2001 to September, 2001 be upheld.

---

Ted Sherrod  
Administrative Law Judge

Date: October 21, 2002